UNITED STATES GOVERNMENT BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 16

Deer Park, Texas

SAFETY KLEEN DEER PARK, INC.1

Employer

and Case No. 16-RC-10209

TEAMSTERS, LOCAL UNION 988

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds²:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The parties have stipulated, and I find, that Safety Kleen Deer Park, Inc. is a Delaware corporation with a place of business located in Deer Park, Texas, where it is engaged in the business of

¹The Employer's name appears as amended at hearing.

² Both the Petitioner and Employer submitted briefs which were duly considered.

hazardous waste incineration. During the past 12 months, a representative period, the Employer, in the course and conduct of its business operations, performed services valued in excess of \$50,000 in states outside the State of Texas.

- 3. The labor organization involved claims to represent certain employees of the Employer. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer operates a hazardous waste incineration facility in Deer Park, Texas. In conjunction with the operation of this business, the Employer maintains an environmental laboratory at the Deer Park facility where it analyzes hazardous waste loads for PCBs and ash resulting from the Employer's incineration process. The Employer's environmental laboratory is staffed by a Laboratory Manager, two Lead Chemists and three General Chemists.

Petitioner seeks to represent the Employer's three General Chemists and to exclude all other employees, including guards, watchmen and supervisors as defined in the Act. The Petitioner also specifically urges that the Employer's two Lead Chemists, referred to herein as "Lead Chemist" and "Project Chemist", respectively, or "Lead Chemists" collectively, should be excluded from the bargaining unit as supervisors as defined in Section 2(11) of the Act. The Employer contends that its Lead and Project Chemists are not supervisors under Section 2(11) of the Act and that they share a

significant community of interest mandating their inclusion in the bargaining unit. There is no bargaining history with the employees in the proposed bargaining unit.

The Employer's Laboratory Manager is responsible for the direct supervision of the lab and handles all personnel issues. The Laboratory Manager has the sole authority to hire employees for the lab. He also provides input to his superiors concerning the salary and wage program for the environmental lab. He disciplines employees. He also conducts performance evaluations for employees with input from the former lab supervisor, the Lead Chemist, the Project Chemist and the individual being reviewed. The record reflects that the Employer no longer maintains a Laboratory Supervisor position. The Laboratory Manager assumed most of the former Laboratory Supervisor's duties. The Laboratory Manager is responsible for completing the Employer's performance review information on the evaluation forms and conducts employee reviews. The Laboratory Manager has the authority to make changes in chemists' working conditions, but will consult his supervisor before making any changes. The Laboratory Manager is the sole person with the authority to grant an employee's request for an extended absence from work. The Laboratory Manager does not determine the pay rates of lab employees, as the Laboratory Manager's supervisor makes those decisions. While the parties did not stipulate that the Laboratory Manager is a supervisor as defined in Section 2(11) of the Act, the facts in this matter clearly reflect that he possesses such authority.

The Project Chemist reports directly to the Laboratory Manager. Both the Lead Chemist and the Project Chemist work in the lab along with the General Chemists. The lab consists of five rooms with a hallway office attached. Three of the rooms contain gas

chromatography instruments, one room is used for conducting extractions and the other room is used for ash preparation and water extractions. The Laboratory Manager has overall responsibility for the operation of the lab.

The Employer's Lead Chemist, Project Chemist and General Chemists all use gas chromatography equipment in the performance of their jobs. Neither the General Chemists nor the Lead and Project Chemists are assigned a particular piece of equipment. The Employer requires that individuals working in its Lead, Project or General Chemists positions possess degrees in chemistry as a condition of employment.

The record reflects that the Employer's Lead and Project Chemists maintain daily contact with the General Chemists. The General Chemists' job duties primarily involve collecting ash samples and preparing these samples for analysis. After the collection and preparation of samples is complete, the Lead Chemist calibrates the instruments on which the samples are analyzed and the General Chemists then performs the required analysis. If the Lead Chemist is busy or cannot calibrate the instruments, the General Chemists will perform the calibration. Occasionally, the Lead Chemist will collect ash samples for analysis.

The Lead Chemist is responsible for calibrating gas chromatography instruments. The Lead Chemist works in the same rooms as the General Chemists. The record reflects that the Lead Chemist and General Chemists regularly check each other's work and assist each other in the performance of their respective job duties. The Lead Chemist will assist a General Chemist who is having difficulties performing his or her job duties. The General Chemists also assist each other with these problems.

The record reflects significant interchange of job duties and functions between and among the Employer's Lead, Project and General Chemists. The Employer's Lead Chemist fills in for both the Project Chemist and General Chemists when any of these employees are absent from work. Conversely, General Chemists will also cover for the Lead Chemist or the Project Chemist during absences from work. On occasional weekends, the Lead Chemist acts as a General Chemist. General Chemists will review paperwork for the Project Chemist in the Project Chemist's absence. The Lead Chemist also conducts sample analysis.

The Employer's Project Chemist is responsible for performing a secondary check on every analysis performed by the General Chemists and entering the results into logbooks maintained by the Employer. She spends about 80% of her time performing this function. When the Project Chemist finds an error in analysis, she can instruct the General Chemist to repeat the analysis or to correct the number in the logbook. When the Project Chemist is unavailable, the General Chemists have the authority to check each other's work and sign off on the results. If the General Chemists have reviewed each other's work, the Project Chemist does not review it again, unless the analysis is left in her box.

The record reflects that in the performance of their respective job functions, the Project Chemist and General Chemists maintain regular contact throughout the workday, discussing the General Chemists' analysis and what the Project Chemist found in her review. Approximately 25 to 30% of the Project Chemist's workday is spent with the General Chemists. The Project Chemist also performs various duties including: clearing out the refrigerators where samples are stored, recording the results of her analyses in

logbooks and filing the logbooks, discussing with the General Chemists problems she has discovered during her analysis, and entering data into the project information system.

The record reflects that General Chemists regularly come and go into the Project Chemist's office. The Project Chemist has a desk in her office. The Lead Chemist has a desk in the lab, where there are also two desks used by the General Chemists.

Finally, the Project Chemist occasionally uses a gas chromatography instrument to troubleshoot or to perform maintenance. The Project Chemist, like the Lead Chemist, fills in for General Chemists when they are unavailable and, in the Lead Chemist's absence, will perform some of the Lead Chemist's duties.

With respect to hours of work, the record reveals that the hours of the lab operations are 6:00 a.m. to 8:00 p.m. General Chemists work two shifts: 6:00 a.m. to 2:30 p.m. and 11:30 a.m. to 8:00 p.m. The General Chemists' shifts rotate every three weeks and they work rotating weekends. The Lead Chemist works one weekend a month or when necessary. The record reflects that the General Chemists' weekend rotation schedule is maintained by the General Chemists themselves. A General Chemist has never been denied requested time off on the weekend.

The Lead and Project Chemists, on the other hand, do not work rotating shifts. The Lead Chemist works from 6:30 a.m. to 2:30 p.m., but will stay later, if necessary. When the Lead Chemist leaves work at 2:30 p.m., the General Chemists go to the Laboratory Manager or the Project Chemist should they have questions concerning work-related matters. The record does not reflect the specific hours worked by the Project Chemist.

The Lead and General Chemists share the same parking area, receive the same employee benefits, utilize the same break room and wear the same lab coats. The Lead and General Chemists have meetings to discuss workplace matters, which may be called by either the Lead Chemist or a General Chemist.

Both the General Chemists and Lead and Project Chemists are paid on a salaried basis, but the General Chemists' salaries are broken into an hourly rate. The General Chemists earn time and one-half for weekly hours worked over 40. The Lead Chemists earn no additional compensation for weekly hours worked in excess of 40. There is no evidence reflecting the specific wages earned by General Chemists and the Employer's Lead and Project Chemists.

Both the Lead and the Project Chemists previously worked as General Chemists and Senior Chemists before assuming their current titles. The Lead Chemist has greater seniority than the General Chemists and has the ability to do most of the jobs in the lab. While she also conducts some training and orders supplies, the record reflects that a General Chemist ordered supplies in her absence and has also conducted training. In addition, the General Chemists train each other on a regular basis.

With respect to the asserted supervisory authority possessed by the Lead and Project Chemists, the record initially reflects that neither the Project nor Lead Chemists hire or fire employees, discipline employees, nor do they grant raises to employees. The Lead Chemist does not assign work to General Chemists. Instead, the work is distributed on the basis of employee availability. Additionally, the Lead and Project Chemists do not grant time off. The lab has a collaborative method for scheduling work, with the Lead Chemist and General Chemists working on scheduling together.

With respect to the authority to grant employees' vacation requests, the record reflects that such requests are made in January and are submitted to the Lead Chemist who, in turn, submits them to the Laboratory Manager. The Lead Chemist does not approve vacation requests. The Lead Chemist may grant a particular day off, provided the schedule allows it. While the Lead Chemist and the General Chemists usually work out scheduling matters, the Laboratory Manager has the final say.

The record also reflects that General Chemists who call in sick generally speak to the Lead Chemist, however, they may tell whoever answers the phone that they will not be in. When such an absence occurs, the information is relayed to the Lead Chemist who, in turn, lets the Laboratory Manager know. The General Chemists do not need to secure prior approval from the Lead Chemist. When a General Chemist takes the day off, he or she fills out a form, which the Lead Chemist is authorized to sign. The form may be submitted after the time off has been taken. The Lead Chemist has never declined to sign a request for a day off.

In addition to the above-described evidence concerning the purported supervisory authority of the Employer's Lead Chemists, the record reflects that the Lead Chemist spends 100% of her time as a chemist calibrating the instruments and does not oversee the work of the General Chemists, as they work independently. Based on the training and experience of the Employer's General Chemists, the Lead Chemist spends only one to two percent of her time instructing the General Chemists.

While the record reveals the Lead Chemist once participated in a part-time job applicant's interview and provided her opinion to the Laboratory Manager about whether the applicant should be hired, the Laboratory Manager conducted the actual interview

and made the decision to hire the applicant. Additionally, the Lead Chemist, along with the Laboratory Manager, another supervisor and the Project Chemist participate in the annual performance reviews of the three General Chemists. While the Lead Chemist has participated in these evaluations, it is unclear whether the Laboratory Manager relied upon her opinion concerning the employees' evaluations.

Additionally, while the Lead Chemist is authorized to sign time sheets for herself and for the General Chemists, she does not review the sheets for accuracy. After she signs the time sheets, they are given to the departmental administrative assistant for further processing. The Project Chemist, on the other hand, does not regularly sign or review time sheets. The record reflects a single occasion where she signed a time sheet, without prior authorization, when no one else was available.

Finally, both the Project and Lead Chemist's names appear on certain distribution sheets of the Employer. On one of the forms, the Lead Chemist's name appears with the names of persons who were either unidentified or identified as supervisors. On one occasion, the Project Chemist typed and sent by e-mail a refinement of a procedure that was developed by the Laboratory Manager, Lead Chemist, Project Chemist and the General Chemists. The Project Chemist did so because she has a computer that has e-mail capabilities. The record reflects General Chemists have used the Project Chemist's computer to access the project information system. The General Chemists have other computers in the lab which are located on almost every instrument, but these computers do not have e-mail access on them.

2(11) Status of the Lead and Project Chemists

As the party seeking to exclude the Lead and Project Chemists as supervisors under the Act, Petitioner bears the burden of establishing their Section 2(11) supervisory status. *North Jersey Newspapers Co.*, 322 NLRB 394 (1996). While it is well settled that possession of any one of the indicia listed in Section 2(11) of the Act is sufficient to find supervisory status, such authority must be exercised with independent judgment on behalf of management and not in a routine manner. *J.C. Brock Corp.*, 314 NLRB 157 (1994). If the evidence is not conclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of that indicia. *Custom Mattress Manufacturing*, 327 NLRB No. 30, slip. op. at 3 (1998) [citation omitted.]

A statutory supervisor under Section 2(11) of the Act is an individual who "[has] authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The possession of any one of these powers can be sufficient to find supervisory status. *Arizona Public Service Co.*, 310 NLRB 477 (1993).

The Board has recently restated that Congress intended that Section 2(11) exclude "only truly supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors, and not 'straw bosses, leadmen, set-up men and other minor supervisory employees." *Baby Watson Cheesecake*, 320 NLRB 779, 783 (1996)

[citation omitted]. Because of this, the exercise of some authority in a merely routine matter does not transform an employee into a statutory supervisor. *Baby Watson Cheesecake*, 320 NLRB at 783 [citations omitted].

The record establishes that the Lead Chemist and Project Chemist lack the authority to hire, fire, transfer, lay off, recall, promote, discharge, reward or discipline employees. Moreover, the record shows that the Lead Chemist and Project Chemist do not adjust grievances of the General Chemists. The authority to perform these actions rests with the Laboratory Manager.

The record reflects that the Lead Chemist may grant an employee a day off without seeking the approval of the Laboratory Manager. Additionally, the Lead Chemists signs (but does not review) time sheets. She may also sign a "Time Off" form that may be submitted after a day off is taken. Although the Lead Chemist is involved in training, the record reveals that she performs her training function only one to two percent of the time and that the General Chemists conduct training as well. Additionally, the Lead Chemist participated on one occasion in the job interview for a part-time employee and gave her opinion about whether the applicant should be hired, but the Laboratory Manager made the decision to hire the employee. Finally, the Lead Chemist participated in the performance evaluations of General Chemists by making limited comments during the course of the evaluations.

Such limited exercise of authority is not sufficient to transform the Lead Chemist into a statutory supervisor. Moreover, while the record reveals that the Lead Chemist has on occasion granted employees a day off without seeking approval by the Laboratory Manager, it is well settled that such "sporadic exercise of some supervisory authority

does not of itself turn an employee into a supervisor." *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76 (1995) citing *NLRB v. Lindsay Papers*, 315 F.2d 709, 712 (5th Cir. 1963). See also, *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985); *Indiana Refrigerator Lines*, 157 NLRB 539 (1966); *Meijer Supermarkets*, 142 NLRB 513 (1963). Likewise, with respect to the aforementioned role that the Lead Chemist plays in signing the time sheets, it is well settled that such duties are routine and clerical in nature and cannot give rise to a finding of supervisory status. See, *PECO Energy Co.*, 322 NLRB 1074 (1997) (Board found the recording of employee hours worked and the submission of this information to be routine and clerical in nature, rather than supervisory.)

An employee does not become a supervisor because he gives some instructions or minor orders to other employees. *Baby Watson Cheesecake*, 320 NLRB at 783 [citation omitted]. Thus, the Lead Chemist's occasional training or workplace direction does not give rise to a finding that she is a supervisor as defined in Section 2(11) of the Act. Moreover, an employee does not become a supervisor because he or she has greater skills and job responsibilities or more duties than fellow employees do or directs less experienced employees. *Baby Watson Cheesecake*, 320 NLRB at 783 and *Nymed*, *Inc.*, 320 NLRB 806 (1996). In addition, "training of employees does not necessarily confer supervisory status." *Sorensen Lighted Controls*, 286 NLRB 969, 987 (1987).

With regard to the Lead Chemists participation in performance evaluations, the evidence fails to show the effect that her comments had on the General Chemist's terms and conditions of employment. Therefore, there is no evidence that the Lead Chemist's opinions were effective recommendations of personnel actions and does not show

supervisory status. *North Jersey Newspapers Co.*, 322 NLRB at 395 [citation omitted]. Also, the expression of opinion about the work performance of other employees does not establish supervisory status. *Cook Composites and Polymers Co.*, 313 NLRB 1105 (1994). Likewise, the Lead Chemist's limited participation in the interview of the part-time employee also fails to show supervisory status as there is no evidence that her opinion resulted in the hiring of the employee or what weight her opinion carried. *The Door*, 297 NLRB 601, 602 (1990).

The record also reveals that the Project Chemist reviews the analysis performed by the General Chemists and may direct the General Chemist to redo the analysis or correct paperwork. The record also shows that the General Chemists check each other's analysis and sign off the results in the log and on these occasions the analysis will not be reviewed again, unless the analysis in the Project Chemist's box. This exercise of authority does not establish the Project Chemist to be a supervisor under the Act. As the Board noted in *Brown & Root, Inc.* 314 NLRB 19, 22 (1994):

It is well established that the exercise of authority on the part of more skilled and experienced employees (such as typical leadmen in crafts) to assign and direct other employees in order to assure the technical quality of the job does not in itself confer supervisory status.

See also, Chicago Metallic Corp., 273 NLRB 1677, 1692 (1985).

While the record shows that the Lead and Project Chemists occasionally direct the work of the General Chemists, the ability to direct work or to assign work does not establish supervisory status if such direction is exercised in a routine fashion. *Arizona Public Service*, 310 NLRB at 480. Here, there is substantial evidence that the General Chemists and Lead Chemists are highly trained individuals, have the same educational

background and perform work based upon availability. When an employer's process is routine and the employees need little direction in their performance of their jobs, the direction of employees is considered routine, rather than an exercise of independent judgment. *J.C. Brock*, 314 NLRB at 158.

Community of Interest

It is well settled that in cases concerning a question of representation the unit sought by Petitioner must be an appropriate unit, regardless of whether a broader unit is also appropriate. *Century Moving and Storage*, 251 NLRB 671, 679 (1980), citing *Pilot Freight Carriers, Inc.*, 223 NLRB 286 (1976). When determining whether a petitioned-for unit is appropriate, the Board considers whether the employees in the unit have a sufficient "community of interest". *Swift & Co.*, 129 NLRB 1391 (1961); *United States Steel Corp.*, 192 NLRB 58 (1971). Factors to be considered in making such a determination include: (1) degree of functional integration; (2) common supervision; (3) nature of employee skill and function; (4) interchangeability and contact among employees; (5) work situs; (6) general working conditions; and (7) fringe benefits. In determining whether a petitioned-for unit is appropriate, the Board has also found the petitioner's request to be a relevant consideration. *Marx Oxygen Company of Alabama*, 147 NLRB 228 (1964).

The record establishes that the Employer's General Chemists, Lead Chemist and Project Chemist share a sufficient community of interest. Their jobs are functionally integrated as the General Chemists conduct analysis using equipment calibrated by the Lead Chemist with the final step of the process being the check of the analysis by the Project Chemist. The General Chemists also calibrate instruments on occasion and

conduct final analysis. Moreover, they share similar job skills and functions. All use gas chromatography equipment in the performance of their work. They all possess a bachelor's degree in chemistry.

The Lead Chemist, Project Chemist and General Chemists have common supervision as they are supervised by the Laboratory Manager, who has authority to hire, fire and to grant extended time off. The Laboratory Manager's direct supervisor determines their wages.

Additionally, the record is replete with evidence of interchange and interaction between the General, Lead and Project Chemists. The Lead Chemist will cover for a General Chemist who is absent and the Project and Lead Chemists will work as General Chemists on some weekends. General Chemists have performed the duties of both the Lead Chemist and the Project Chemist on occasion. The Lead Chemist works with the General Chemists and calibrates instruments for their use and also performs sample testing. The General Chemists have daily contact with the Lead and Project Chemists.

These employees share the same work situs, as they work in the same four-room lab. The Project Chemist works primarily in a separate room of the lab and will enter the rooms where the General Chemists work on a regular basis. The General Chemists will come and go into the Project Chemist's room. Additionally, they share the same working conditions, as they work in the same lab, park in the same lot, wear the same lab coats, use the same break room and use gas chromatography instruments in their work.

While the record does not reflect the specific wages paid to the Employer's lab employees, the General Chemists, Lead and Project Chemists are all paid on a salary basis. Additionally, all receive the same benefits.

Based upon the foregoing, including the lack of bargaining history, the

established community of interest and the high degree of functional integration between

the General Chemists, Lead Chemists and Project Chemists, I find the petitioned-for unit,

excluding the Lead and Project Chemists, to be inappropriate. Because the Petitioner has

expressed an unwillingness to proceed to an election in this broader unit, I find that the

petition should be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition herein be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a

request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by May 25, 2000.

DATED May 11, 2000, at Fort Worth, Texas.

/s/ Martha Kinard

Martha Kinard, Acting Regional Director

NLRB Region 16

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